

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

TOBY KEVIN ANDERSON,

Petitioner,

v.

PATRICK GLEBE,

Respondent.

CASE NO. 13-5893 RJB-KLS

ORDER ON REPORT AND
RECOMMENDATION

This matter comes before the Court on the Report and Recommendation of U.S. Magistrate Judge Karen L. Strombom. Dkt. 21. The Court has considered the Report and Recommendation and the remaining record.

Petitioner seeks habeas relief under 28 U.S.C. § 2254 from his 210 month sentence after a 2009 conviction for first degree robbery while armed with a firearm, first degree criminal impersonation, and second degree prowling. Dkt. 1.

1 He raises the following grounds for relief:

- 2 1) Petitioner “was denied due process of law under the Fourteenth Amendment to the
3 United States Constitution when he was convicted of robbery despite the fact that the
4 State provided insufficient evidence to prove he acted as an accomplice to the crime.”
- 5 a) It was “speculation that Petitioner got out of the defendants’ vehicle while at
6 the victims’ residence;”
- 7 b) “Even with the aforesaid speculative testimony, the evidence was insufficient;
8 there was evidence that someone “just stood there;”
- 9 c) “Even if the evidence was sufficient to establish that Petitioner acted as an
10 accomplice to a crime, it was to theft not robbery.”
- 11 2) Petitioner “was denied effective assistance of counsel under the Sixth and Fourteenth
12 Amendment to the United States Constitution when his trial counsel failed to object
13 to the admission of testimony about the images produced by a malfunctioning camera
14 and monitor.”
- 15 3) Petitioner “was denied due process of law under the Fourteenth Amendment to the
16 United States Constitution when the trial court gave instruction No. 15, which
17 allowed the jury to convict Petitioner as an accomplice to a different crime (theft)
18 than the one he was charged with (robbery) and thereby relieved the state of the
19 burden of proof.”
- 20 4) Petitioner “was denied his right to a fair trial before a fair and impartial judge under
21 the Sixth and Fourteenth Amendments to the United States Constitution when the trial
22 judge, who is related to the victims, failed to recuse himself.

23 Dkt. 1.
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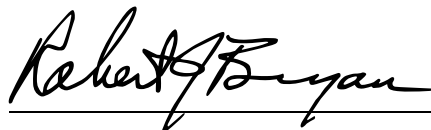
1 On April 9, 2014, the Report and Recommendation was filed, recommending that Claim
2 One, subparts a and b, and Claim Three, in its entirety, be dismissed for failure to properly
3 exhaust. Dkt. 21. It recommends denying the remainder of the habeas petition on the merits. *Id.*
4 Lastly, the Report and Recommendation recommends denying the issuance of a certificate of
5 appealability. *Id.*

6 The Report and Recommendation should be adopted for the reasons stated therein and the
7 petition dismissed. Further, a certificate of appealability should not issue.

8 It is **ORDERED** that:

- 9 1) The Report and Recommendation (Dkt. 21) **IS ADOPTED**;
- 10 2) Subparts a and b of Claim 1 and Claim 3 of the habeas petition are **DISMISSED for**
11 **failure to exhaust**; Subpart c of Claim 1, Claim 2, and Claim 4 are **DENIED on the**
12 **merits and DISMISSED WITH PREJUDICE**;
- 13 3) The certificate of appealability is **DENIED**;
- 14 4) The Clerk is directed to send copies of this Order to Petitioner, counsel for
15 Respondent and to the Hon. Karen L. Strombom.

16 Dated this 28th day of April, 2014.

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18 ROBERT J. BRYAN
19 United States District Judge
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